Cambridge University Press et al v. Patton et al
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
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CAMBRIDGE UNIVERSITY PRESS,
OXFORD UNIVERSITY PRESS, INC.,
and SAGE PUBLICATIONS, INC.
Plaintiffs,
v. 1:08 Civ. 1425 ODE
MARK P. BECKER, in his
official capacity as Georgia
State University President, et
al.,
Defendants.
------------------------------x

DEPOSITION OF ROBERT B.K. DEWAR
New York, New York
December 8, 2009

Reported by:
MARY F. BOWMAN, RPR, CRR
JOB NO. 26341

December 8, 2009
10:05 a.m.

Deposition of ROBERT B.K. DEWAR, held at the offices of King & Spalding, LLP, 1185 Avenue of the Americas, New York, New York, before Mary F. Bowman, a Registered Professional Reporter, Certified Realtime Reporter, and Notary Public of the States of New York and New Jersey.

APPEARANCES:

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BY: TODD D. LARSON, ESQ.

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Attorneys for Defendants
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BY: STEPHEN M. SCHAETZEL, ESQ.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that filing and sealing be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be sworn to and signed before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.

DEWAR

ROBERT B.K. DEWAR,
called as a witness by the Defendants,
having been duly sworn, testified as
follows:

EXAMINATION BY
MR. SCHAETZEL:

Q. Good morning, Professor Dewar. My name is Steve Schaetzel. I am with King & Spalding. Obviously you are in our New York office here.

We are here to take your deposition in matter of Cambridge V Patton, although that style has now changed to Mary Becker -- I am sorry, Mark Becker, who was more recently named president of Georgia State University. He is named in his official capacity. I would like to get this marked as the first exhibit if I could.

(Exhibit 1, Expert Report of Robert B.K. Dewar marked for identification, as of this date.)

Q. Professor Dewar, I understand from looking at the report that has been handed to you as Exhibit 1 for identification that you

DEWAR

have been deposed before. Do I understand that correctly?

A. Yes, yes.

Q. I presume that this will go very much as any previous deposition has gone, but I will ask a question. If you don't understand my question, please feel free to ask me to rephrase it. My purpose will be obviously to elicit certain information and an understanding of what is in your report. So don't hesitate if I have made things mucky. I do not mean to.

A. Fair enough.

Q. With reference to Exhibit 1, could you confirm for the record, sir, that this is the expert report that was prepared and filed in this case in your name?

A. It looks like. Obviously, I won't take the time to read every word, but, yes, it is familiar, layout is the same, the page is the same.

Q. That, for example, is your signature?

A. That is my signature, yes.

Q. Very well. Does your report contain a statement of all the opinions that you have

DEWAR

formulated for this matter?

A. Yes, it does.

Q. What did you do to reach the opinions that are in this report?

A. Well, I -- there are a number of materials that I consulted, the original complaint, the Crews report, and the deposition material that described the operation of the system. I mean, I had a pretty clear idea of how the system worked and I confirmed that clear idea from those materials.

I also went to the website although -- there is a point where you can't go beyond without a password, but I went to that point.

Q. Do I understand then, sir, that to prepare this report, you reviewed the complaint, is that correct?

A. That's correct.

Q. And you reviewed Professor Crews' report?

A. Yes, that's correct.

Q. And you reviewed certain depositions, correct?

A. Right.

DEWAR

Q. And you reviewed certain websites?

A. That's correct, yes.

Q. If you would look at Exhibit B to your report. Rather than try and make this a memory test, let's see if we can short-circuit, I think the only thing we may have missed is looking at some stipulations of fact.

A. That's correct, I did look at those stipulations of fact.

MR. LARSON: Let -- just let him finish his questions.

THE WITNESS: Sorry.

Q. That's quite all right. Is there anything else that you recall reviewing in preparation of this report that is not on this list at Exhibit B or appendix B?

A. No. No, this is complete.

Q. Did you ask to review anything that is not shown on this appendix or that was not given to you to review?

A. No.

Q. Did you think that there was anything else you should have reviewed in order to form the opinions that are in your report?

DEWAR

A. No.

Q. If we could look at page -- I believe at the bottom if you use those numbers, Exhibit A-20, that page.

MR. LARSON: I should probably note for the record the Exhibit A20, those numbers at the bottom of the pages were added because this was submitted to the court as an exhibit to some disclosures to the court.

Q. There is a heading "Legal Consulting." Do you see that?

A. Yes.

Q. I would like to ask you about some of the legal consulting work that's listed here. The first one, "National Data Communications versus St. Mary's Hospital," and it states, "Case involving software copyright issues. Trial in U.S. Federal Court, Texas, 1982."

My first question is, is the year 1982 there a reference to the date the case was tried?

A. I believe so.

Q. Would it be safe to say that you did

DEWAR

the consulting work in the 1982 time frame?
Would it have been much earlier than that?
A. No, it was in that time frame.
Q. What was the nature of the consulting that you did in that matter?
A. The St. Mary's had produced a hospital data system and they had been previous customers of the other party and the other party was threatening to file a copyright infringement suit, never actually did file that suit, St. Mary's filed for a declaratory judgment.
Q. What was the role that you played in the case?
A. To examine the systems and give opinions on whether there was infringement of copyright.
Q. What did you do to determine whether there was infringement of copyright?
A. Looked at extensive documentation of the software involved, I interviewed people who had worked on the software at St. Mary's, exact -- I actually examined some of the source code involved, a fairly deep examination of the two systems.

DEWAR

Q. What was the copyrighted material that the other party contended was infringed?

A. It was their software program for hospital management.

Q. So, for example, was it source code?

A. It was source code, yes.

Q. And was the -- I guess the owner of the copyright was National Data?

A. Yes.

Q. What material did you look at that belonged to National Data, as best you recall?

A. It's a long time ago. I believe I had access to their software under, you know, protective order. I certainly had access to a lot of their material. I don't know if I -- I can't for sure recall whether I actually examined their source code. I believe I did.

Q. Do you recall if you came to a conclusion as to whether or not there was infringement?

A. I definitely came to the conclusion there was no infringement.

Q. What was the basis for your conclusion of no infringement?

DEWAR

A. The primary basis, there was no access. St. Mary's never had access to that program. I mean, they used the program, but never had access to the source code, never had access to internal documentation, and to my satisfaction, they had developed their system entirely independently.

Q. Do you recall if you found similarities between the National Data copyrighted material and the St. Mary's source code that was accused of infringement?

A. Not beyond what is dictated by external requirements.

Q. So there was some similarity but it was dictated by external requirements?

A. Yes.

Q. Did your role include testifying in court?

A. It did, yes.

Q. Was there an issue of fair use that you recall in that case?

A. No.

Q. There was no issue of fair use?

A. There was no issue of fair use.

DEWAR

Q. If you look at the next item on page -- we are referencing as Exhibit A20?

A. Yes.

Q. This is the Selden v. Honeywell case. It appears from the description here there was no issue of copyright at all in this matter, is that correct?

A. None whatsoever.

Q. The next item, number 3, after the cite, it is listed as Intergraph versus Bentley, 1998. Can you explain for me what the 1998 reference is?

A. That's, to the best of my recollection, was the date of the trial and the date at which, around which I did all the work for that.

Q. In -- I guess before we move, one further question, if we could back up to the first item, National Data Communications, I presume you were retained by the St. Mary's side of the case, is that correct?

A. That's correct.

Q. In the Intergraph versus Bentley case, which side of the case were you retained by?

DEWAR

A. Intergraph.

Q. What was your role in this matter?

A. I was asked to give opinions on -- it was more centered around the licensing issues, so I was asked to give technical opinions on the meaning of certain terms in the license agreement.

Q. What, if any, role did you play in the part that's listed here for the side of the case to the extent it involves software copyright?

MR. LARSON: Objection to the form.

You can answer.

A. The copyright issues were really ancillary. If the license wasn't valid, then one could have concluded there was a copyright infringement, but the center of the case was on the licensing issues.

Q. Did you address in this work whether there was copyright infringement?

A. No. I should add some clarification then. Indirectly, yes, because the licensing, if the license had been read one way, there was clearly a copyright infringement. If the license was read another way, there wasn't a

DEWAR

copyright infringement. But the copyright itself was not a focus.

Q. Is it correct that if the license was found to be valid, there was no copyright infringement, and if the license was found to be valid, there was at least arguably copyright infringement?

A. Correct.

MR. LARSON: Just to -- did you mean invalid in the second part of the question?

A. I think you meant invalid.

Q. I think I did mean invalid, thank you, because the first part I obviously said was valid.

A. Yes.

Q. So in other words, if whatever the defendant was doing was not licensed, it was arguably copyright infringement?

A. Yes.

Q. Correct, OK. What was the nature of the testimony that you were asked to provide as it pertained to licensing?

A. The specific issue was what it meant for one program to use another, a rather vague

DEWAR

term in the license that was the focus of the case.

Q. What was Intergraph's position as to whether or not one program used another under the terms of that license agreement?

A. Intergraph's position was that the one program was not using the other.

Q. Did you give an opinion as to whether or not one program was or was not using the other program?

A. I did.

Q. What was that opinion?

A. That it wasn't using it in the sense of the license agreement.

Q. Did you work in -- did your work in that matter include testifying in court?

A. It did.

Q. Was there any issue of fair use in that case?

A. No.

Q. I would like to go to item number 4 in this list.

A. Yes.

Q. GEAC v. Grace. The date there are

DEWAR

listed as 1997 to 2000 and it reads, "Case involving software copyright issues. Trial in Newark Federal Court."

First of all, could you explain the dates, what was done between 1997 and 2000?

A. Well, it dragged on for a long time; extended discovery, depositions over a long time, trial delays.

Q. OK. What was your role in this case?

A. To give opinions on whether software copyright infringement had occurred.

Q. What did you do to determine whether any copyright infringement had occurred?

A. I looked extensively at all the software involved on both sides.

Q. What was the nature of the software at issue?

A. It was tax payroll preparation software for an IBM mainframe.

Q. Who was your client in this matter?

A. Grace.

Q. And Grace was the defendant in the case?

A. Grace was the defendant in the case,

DEWAR

yes.

Q. Did you come to an opinion as to whether or not Grace had infringed any copyrights?

A. I did come to an opinion.

Q. What was that opinion?

A. That there was no infringement.

Q. What was the basis for your opinion of no infringement?

A. Well, the -- the plaintiffs were putting forward a novel but unsustainable theory on infringement which I couldn't agree with technically.

Q. What was that theory?

A. That if a program is running under an operating system and make a call to an operating system function, then that's logically equivalent to copying that piece of the operating system into the program and, therefore, should be treated the same from the point of view of infringement.

Q. Because the plaintiff argued that that copy, under this novel system, as you called it, would have been the infringing copy?

DEWAR

A. Would have been the infringing copy.
Q. Why was there no copy being made in that call?
A. There is no -- technically, there is no copy. I mean, the control -- if you run a program under Windows and it calls a Windows function, nothing is being copied.
Q. OK. And in application to the GEAC v. Grace case, what was the program that was at issue that would be the equivalent of Windows in the example you gave?
A. It was an applications programs created by the plaintiff, by GEAC.
Q. Is GEAC, an appropriate way to say the plaintiff's --
A. If I am remembering right, yes.
Q. Do you remember if GEAC retained an expert?
A. They did.
Q. Do you recall who that was?
A. Not reliably.
Q. Do I understand from the last part of this, trial in Newark Federal Court, that you testified in Newark?

DEWAR

A. I did. yes.

Q. Was there an issue of fair use in this case?

A. No.

Q. Looking at the last item in this list, it appears to me there was no copyright infringement issue in the Cable & Wireless case, is that correct?

A. That's correct. It was purely a patent case.

Q. Have you been involved in any other legal consulting that is not a part of this list?

A. Yes.

Q. Has any of that resulted in testimony or --

A. No.

Q. OK. Generally describe what is the nature of the other legal consulting that you do?

MR. LARSON: Objection to form.

You can answer.

A. A number of unrelated matters.

Q. Let me ask some additional questions

DEWAR

that might help to focus it. For example, have you been involved in other legal consulting, making a determination of whether or not there was copyright infringement?

A. Yes, I have.

Q. Have you been involved in other legal matters of making any determination as to whether or not there was fair use under the copyright statute?

A. No.

Q. When you generally described in these instances where you're making a determination for copyright infringement, what do you do in order to make that opinion?

MR. LARSON: Objection to the form.

You can answer.

A. It is difficult to give a general answer, but I understand the notion of a software copyright infringement pretty well. I'm familiar with the Altai tests of the Third Circuit and so it has varied how deeply I have moved into the case.

Q. In these cases where you -- I am sorry, not cases. In these instances where you

DEWAR

are trying to make a determination of copyright infringement, do you look at the copyright owners' software generally speaking?

MR. LARSON: I object to the vagueness of the question. If you can answer on a general level, you should.

A. In some cases.

Q. In what cases would you not look at the copyright owner's material?

A. If it could be clearly established there was no access to that material, there is no point in looking at it.

Q. In those cases where you do look at the copyright owner's material, do you undertake a comparison of the copyright owner's material to the potentially infringing material?

MR. LARSON: Same objection.

A. Yes, in at least in some cases, yes.

Q. Have you had the experience of trying to go through the copyright owner's material and potentially accused infringing materials to determine if they are similar enough that there would be copying?

MR. LARSON: Objection to the form.

DEWAR

You can answer.

A. Not really. In the cases I have been involved in, it didn't get that far.

Q. In any of these other matters -- I apologize if I have asked this question, so that's fine if I have, do I understand correctly that you have not participated in an evaluation of whether or not certain acts constituted fair use under the copyright statute?

A. I'm stuck with negatives. So let me state it this way: Fair use has never come up in any of the cases I have been involved in.

Q. Or in the other legal consulting that you have been involved in?

A. Right.

Q. Looking at the first item, the St. Mary's case, do you recall who the attorneys were that you worked with at the law firm?

A. No, it is a Dallas law firm is all I remember.

Q. In the third item, Intergraph case, do you recall who the attorneys were in Philadelphia?

A. It was -- Lunara, L-U-N-A-R-A, was the

DEWAR

principal attorney and it was his small company that -- I don't know if it was called Lunara Associates, but it was something like that.

Q. They were the attorneys or it was his company?

A. They were attorneys. He was really the attorney and he had some people working for him.

Q. What about the GEAC case, do you recall who the attorneys were that represented Grace that you worked with?

A. I am sorry, that was -- what one were you asking about? Lunara was for GEAC and Grace. I apologize.

Q. Quite all right. If we could back you up, Intergraph v. Bentley case.

A. I can't remember.

Q. In any of the cases that are listed here, did you ever have an occasion to consider whether or not there was an issue of a transformative use?

MR. LARSON: Objection to the form.

You can answer.

A. Could you say what you mean by that

DEWAR

exactly.

Q. Sure. Let me ask you this first, have you ever heard in a copyright case of an issue of a transformative use?

A. It's never come up in any of the cases I have been involved in. I have a vague recollection that it has something to do with -- it is one of the four conditions of the fair use thing, but it has never -- it has never come up in any of these cases.

Q. What about in your other legal consulting? Have you had an occasion to address an issue of whether or not a particular use is transformative?

A. No.

Q. If you could please turn to the second page of your report. This one we can use report pages properly. This is page 2. It happens also to be Exhibit A2.

A. Yes.

Q. Do I understand correctly that you first began teaching in 1968 at IIT?

A. That's correct.

Q. Perhaps a quicker way to ask this

DEWAR

question, if you could turn to the page that has been marked as Exhibit A10.

This is a page from your CV and I'm looking at the heading, "Teaching experience." If you could look at what's listed here for undergraduate courses, graduate which bridges over to the next page and just confirm that this is a complete list of all the courses that you have taught.

MR. LARSON: I will object only to the extent that above it, it says it is a representative list.

A. It is nowhere a complete list.

Q. OK. Let me ask the question, does it continue to be a representative list?

A. It does.

Q. Have you ever taught any courses that dealt with issues of copyright infringement?

A. No.

Q. At the end of this item and on the next page, there is "In preparation: Technical Aspects of Software Copyright Issues with NYU Law School." What is that work?

A. I had some preliminary conversations

DEWAR

with someone at the law school and we thought it would be a good idea to prepare such a course, but nothing ever happened.

Q. When you were a professor at IIT, which I believe -- and you know just roughly we are talking in the late '60s and '70s here?

A. Correct.

Q. Did you have materials put on reserve as a professor?

A. I did.

Q. Did you have supplemental reading materials put on reserve?

MR. LARSON: Object to the vagueness of the term "supplemental" by counsel.

A. I had certain books put on reserve that were recommended but not required reading.

Q. Did you form an opinion as to whether or not a certain percentage would read recommended but not required readings?

A. No.

Q. Did you have any reason to think that all of your students in a given class would read recommended but not required materials?

A. Hard to recall. I very rarely used

the library reserves during the IIT period. I'm not actually completely sure I ever used them because it is hard for me to separate what happened at NYU and what happened at IIT.

Q. Have you had the experience where less than all of -- let's stay focused in the IIT time frame. Do you recall if you had an experience where less than all of the students in the given class would have read recommended but not required materials?

MR. LARSON: I object to the foundation, but the witness can answer.

A. No, most courses, several students don't even read the required material, so I would have to say yes to that question.

Q. Do you recall if in the late '60s and '70s, while you were at IIT, was there any form of electronic reserves at IIT?

A. No, it was pretty early on.

Q. In your report, you referred to the course management system. What do you understand a course management system to be?

A. Well, I was -- first of all, let's narrow the term down to electronic course

DEWAR

management because I believe that's the focus. And it's some system that allows the -- that assists or helps with preparing online materials for students.

Q. In an electronic course management system, would students have access to it?

A. Certainly in some cases, yes.

Q. And in, as -- just generally speaking, electronic course management system, the professor would also have access to it, would he not?

A. Yes.

Q. Was there such a system in place at IIT when you were there in the late '60s and early '70s?

A. No.

Q. On page 2 of your report, under "Background and Qualifications," the third sentence in the third line, from 1976 to 2005, I was professor of computer science at the Courant forgive me --

A. Courant.

Q. Courant Institute of Mathematical Sciences, New York University. Is it -- did you

DEWAR

stop teaching in 2005?

A. I stopped teaching in 2005.

Q. Are you still employed full-time?

A. Not by New York University.

Q. But you do have a full-time job?

A. I do.

Q. That's being CEO of Ada Core?

A. Exactly, yes.

Q. What is the business of Ada Core?

A. We produce software systems that are used to build big critical systems, avionics, air traffic control, space applications, defense applications.

Q. In terms of the number of people, approximately how many people are employed by Ada Core?

A. I think it is 28 now.

Q. Do I understand correctly you have locations in New York and France?

A. Right, we have a sister company in France which we work as a technical unit with.

Q. Do the people in France include the 28 that you mentioned?

A. No. It's about double. It's about

DEWAR

that number on both sides.

Q. OK. Do you continue to testify or provide expert testimony even though you have stopped teaching?

MR. LARSON: Objection to form.

A. You are saying have I done so. I don't believe so. Let me just --

Q. Please, that's back at A20 if that helps.

A. Yes. Akamai preceded my retirement from the university.

Q. So then once you retired from the university, are you still available to serve as an expert witness?

A. Yes.

Q. And today is obviously one instance of that?

A. Yes.

Q. The other consulting or other legal consulting that you mentioned, has any of it been between your retirement from the university in 2005 and today?

A. Yes.

Q. I would like to focus on the time

DEWAR

frame while you were employed at New York University between 1976 and 2005. While teaching courses at New York University, did you make use of the library reserve systems?

A. Occasionally.

Q. Generally speaking, under what occasions would you make such use?

A. There were one or two courses where I put some books on reserve.

Q. When you did so, were you aware that New York University had a copyright policy?

A. Yes.

Q. What, if anything, did you do to determine if you were in compliance with that policy?

A. For putting hard copies of books on reserve at the library, I don't believe the issue arises.

Q. If I had been a student in your class and had gone to the library to get that hard copy book that was on reserve, would I have been able to make a hard copy of portions of the book?

A. I don't know.

DEWAR

MR. LARSON: Object on foundation.

A. But I don't know.

Q. Do you know if anything that you provided to the library was ever put on any form of electronic record?

MR. LARSON: Object to the form.

A. I never provided anything to the library.

Q. I am sorry, I thought you at least provided a couple of hard copy books for the library?

A. No, they are books in the library collection and I asked them to be put on reserve.

Q. I see. So they were not your books that you gave --

A. They were not my books, no.

Q. When you put things on reserve, you in a sense took -- designated books that were already in the library to be placed on reserve, is that correct?

A. Yes, that's correct.

Q. When you had those books placed on reserve, in your role as a professor, did you do

DEWAR

anything to preclude students from trying to -- or from being able to make a copy of those books?

MR. LARSON: Objection to form.

A. No.

Q. To your knowledge, did the library service do anything to preclude students from being able to make a hard copy of those books?

A. I have no knowledge of that.

Q. Do you know if there were copying machines available in the library at NYU?

A. No, I don't know.

Q. To your knowledge, does New York University have an e-reserve system?

A. I don't know.

Q. To your knowledge, does New York University have an electronic course management system?

A. I don't know. We never used one in our computer science department because we know how to do that ourselves.

Q. Outside of your teaching experience, have you ever had any experience with -- and other than this case, have you had any

DEWAR

experience with a course management system or using a course management system?

A. No.

Q. Outside of this case, have you had any experience with using an electronic reserve system?

A. No. Could I just ask for a clarification from the previous questions? I am taking in your questions, when you say a course management system, some commercial piece of course management system software?

Q. Or, well, any electronic course management, perhaps you had your own that you did through your students, but yes, I am certainly interested in some commercial software. For example, you mentioned uLearn in the report.

A. I never used any commercial software and I have no experience -- did I do all sorts of stuff on my observe websites, I managed them myself and I did various stuff which I'm sure is somewhat similar in some respects to the commercial software but I wasn't including that in my answer.

DEWAR

Q. OK, in terms of your own websites that you did, would you allow students to have access there so, for example, I could, if I were a student in your class, I could see what my assignment would be for the class?

A. Yes, yes.

MR. LARSON: Objection to form.

You can answer.

Q. Did you post reading materials to your own website?

A. Yes.

Q. How would you post reading materials to your website?

A. It might be PowerPoint slides of my lectures or what was posted, stuff I had written as PDF files, assignments, exams, students' assignments if they gave permission.

Q. Do you recall posting anything that was authored by anyone other than yourself or a student?

A. On some occasions, I posted sets of slides that had been authored by another faculty member at NYU.

Q. Anything else?

DEWAR

A. No.

Q. In terms of things that you had posted on your own websites, have you ever performed an analysis in an effort to determine whether that posting would constitute fair use?

A. No.

Q. In connection with the work that you have done in this case, have you done anything to try to determine whether anything posted on the Georgia State for example uLearn system, that course management system constitute a fair use?

A. No.

Q. Have you done anything in this case to determine whether or not anything posted on the Georgia State e-reserve system constituted a fair use?

A. No.

Q. Have you been asked to undertake any sort of a determination as to whether or not anything posted on the Georgia State electronic reserve system or on the uLearn system constitutes a fair use?

A. No.

DEWAR

Q. In the maintenance of your own websites that you mentioned -- we are still at this NYU time period, while you were at NYU, whose responsibility was it to be certain that those websites complied with the copyright laws?

A. Unclear.

Q. Did you believe that you had such a responsibility?

A. Yes.

Q. Did you believe that anyone else had such a responsibility?

A. No. Let me amend that a little bit.

When I was in a position say as associate director of the institute, I did, on a couple of occasions, monitor other faculty's websites and notice problems which I will bring to their attention. So I think there was some community involvement in that case. Nothing formal.

Q. In these instances that you mentioned, were you acting in effect as a supervisor of these people? I just want to know your role.

A. Not officially.

Q. You said you noticed a problem. What

would be an example of a problem you would notice?

A. One faculty member had written a book and he assigned the copyright to the publisher and he posted the PDF of the whole book on his site. I commented to him he needed permission from the publisher to do that. He said, It's my book. Yes, but you have assigned the copyright and you should clear that with the publisher. That's the one -- actually that's the one instance I recall.

Q. Do you know if New York University has a policy whereby a faculty member will grant a license to the school for use of the authored work pursuant to the school's mission?

MR. LARSON: Object to the form. Object to the relevance. This is well outside the scope of the expert report.

A. No.

Q. No, you don't know?

A. No, I don't know.

Q. How would you characterize the statements that you made to this other faculty member about the PDF of his book that he had

DEWAR

placed on the website?

MR. LARSON: Objection to the form.

You can answer if you understand.

Q. I simply don't want to put words in your mouth. Would you consider it an instruction to take it down, advice or friendly recommendation? I want to understand what it is --

A. Friendly advice.

Q. You indicated he said, Well, it was my book. Did he do anything else in response to the friendly advice?

A. He contacted the publisher.

Q. What happened then?

A. The publisher said it was fine to put up the PDF in this case. Least I think -- that's not a solid memory, but I think that was the resolution.

Q. In terms of preparing the report, other than lawyers, did anyone else help you in the preparation of the report?

A. We did some work together in the late editing stages.

Q. And when you say we --

DEWAR

MR. LARSON: I think the question was other than lawyers.

A. Other than lawyers. Nobody other than lawyers came anywhere near it.

Q. For example, as a professor, oftentimes you might have a graduate student do some research. I am looking if there was, other than lawyers, someone else that helped you.

A. No, entirely my own work.

Q. While you were teaching at IIT, did you ever have any experience with the IIT copyright policy?

MR. LARSON: Object to the relevance of the question.

A. A, I don't know whether there was such a policy, and B, no, if there was such a policy, I had no interaction with it.

Q. Did you ever have any interaction with the NYU copyright policy?

MR. LARSON: Same objection.

A. Not really. Whenever I used a xerox machine at the university, there is a notice posted there, but that's about it.

MR. SCHAETZEL: We have been going

DEWAR

about an hour, is now a reasonable time to take a stretch.

(Recess)

Q. Professor Dewar, how did you get involved in this case?

A. I was contacted and asked if I would be interested. I guess I don't know exactly what the contact was. I think you told me at the time, but I have forgotten.

(Exhibit 2, document Bates stamped Dewar 00071 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 2 for identification. For the record, this was produced at Bates number Dewar 0071. Do you recognize this to be an e-mail string between you and Mr. Larson?

A. Yes.

Q. If you look at approximately the middle of the page, Mr. Larson wrote, "Professor Dewar, Ben Goldberg at NYU passed along your contact information and recommended you as a possible expert witness for a case I am working on. Can you give me a call when you have a

DEWAR

moment to discuss the particulars. Thanks, Todd." That's the language I am referring to?

A. Yes.

Q. Do you know a Mr. Ben Goldberg?

A. Very well, yes.

Q. Who is Mr. Goldberg?

A. A colleague, a professor in the computer science department.

Q. In e-mail, at least at the top, bears a date of October 6, 2009. Do you see that?

A. Yes.

Q. Is that approximately when you were first contacted?

A. Yes.

Q. Do you remember if this was, in fact, the first contact?

A. Well, this is a reply to an e-mail. So it is not the first contact.

Q. You had replied by attaching your resume, correct?

A. Correct.

Q. Do you recall how quickly after a first contact you provided your resume to Mr. Larson?

DEWAR

A. Matter of days.
Q. Do you believe you would have been first contacted about this matter in the first part of October of this year?
A. Yes.
Q. Once you were first contacted about the case, what were you told?
A. Broad outlines of what the matter was about and broad outlines of what I would be -- what opinions would be sought from me.
Q. What do you recall of the broad outlines you were told in terms of what this case was about?
A. That it was about electronic reserve systems and associated copyright issues.
Q. Did you -- first of all, who were you speaking with?
A. Mr. Larson.
Q. Did you ever have an occasion to speak to any other attorneys about this case?
A. At any point?
Q. Yes, sir, at any point.
A. Yes, we met at least one other person whose name I have forgotten. Briefly. My

DEWAR

primary contact has been with Mr. Larson.

Q. Other than attorneys, did you ever speak with anyone else about this case?

A. No.

Q. Was the person who first gave you a broad outline in terms of what the case might be about, was that Mr. Larson?

A. Yes.

Q. What do you recall of the substance that Mr. Larson told you in terms of what the case was about?

MR. LARSON: Object, asked and answered.

A. Just that it was about electronic, use of electronic reserve systems and associated copyright issues and then I asked him to give me a copy of the complaint. So I can't -- it is hard for me to distinguish what I read in the complaint and what you told me.

Q. What do you recall in terms of the broad outlines that you were given regarding an opinion that you might be asked to offer?

A. That the issue they wanted me to focus on was whether and when and under what

DEWAR

circumstance copies were being made from a technical point of view.

Q. Was there ever any discussion of whether you would be asked to give an opinion of whether the making of a given copy resulted in an act of copyright infringement?

A. No.

Q. And you have never been asked to provide such an opinion, is that correct?

A. No, I have never been asked to provide such an opinion.

Q. You mentioned that you asked to review a copy of the complaint.

A. Yes.

Q. Did you ask to review a copy of the answer?

A. I can't recall.

Q. You didn't list the answer in the materials on Exhibit B to your report. Did you ever have occasion to read the answer?

A. No, I -- not that I recall. I don't think I read the answer.

Q. Did you think it was necessary for you to read the answer to give any of the opinions

DEWAR

you were being asked to provide?

A. No.

Q. I would like to get this marked as the next exhibit please.

(Exhibit 3, document Bates stamped Dewar 0001 through 0002 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 3 for identification. What is this document?

A. I am sorry, what is this document? This is a reply from Mr. Larson to the Dewar 2.

Q. The reply mentions the report of Kenneth Crews. Do you see that?

A. Yes. Yes.

Q. Do you know Professor Crews?

A. No.

Q. Have you ever heard of Professor Crews?

A. No.

Q. Have you formed any sort of opinion as to Professor Crews' ability in copyright law?

A. No.

Q. Have you been asked to form any

DEWAR

opinions regarding Professor Crews' ability to serve as an expert in this case?

A. No.

Q. Do you have any reason to believe that Professor Crews could not serve as an expert in this case?

MR. LARSON: Object on foundation grounds.

You can answer.

A. I have never been asked that question, so I guess the answer is no.

Q. Also in Exhibit 3, for identification it says, "Are you available at some point tomorrow for a brief meeting."

Did you meet face-to-face with Mr. Larson?

A. Yes.

Q. Prior to today, how many times did you meet face-to-face with Mr. Larson?

A. Two, maybe three times.

MR. SCHAETZEL: I would like to get this marked as the next exhibit, please.

(Exhibit 4, document Bates stamped Dewar 138 marked for identification, as of

DEWAR

this date.)

Q. You have been handed what has been marked as Exhibit 4, Dewar Exhibit 4 for identification.

A. Yes.

Q. What is this?

A. This is the invoice that I sent for the time I put in on the case up through the last item that's listed here.

Q. Did you know if these items represent -- for the record, this was produced at Dewar Exhibit 00138 or page 138. Do any of these represent in-person meetings?

A. Certainly meeting with Todd represented a personal meeting. And then we met to, from the work on editing the report because some of the final editing, we met to do in person, met in person to do.

Q. Is 450 dollars an hour your standard hourly rate?

A. Yes.

MR. SCHAETZEL: Let's get this marked as the next exhibit please.

(Exhibit 5, document Bates stamped

DEWAR

Dewar 00096 through 108 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 5 for identification. Do you recognize this document as the fact stipulation document that you reviewed?

A. I do.

Q. You indicated that you also reviewed a draft set of stipulations. Do you have an understanding as to why you reviewed both the draft and the final stipulation?

A. My recollection is there was some contended items in the draft that weren't in the final. I'm not absolutely sure whether that was on paper in front of me or from discussions.

Q. I'm not sure I understand what you mean by on paper in front of you?

A. I know there was a discussion of -- there was a discussion of some stipulations that didn't appear in this final document. And I believe they may have been in the draft, but I can't remember for sure.

MR. SCHAETZEL: I would like to get this marked as the next exhibit please.

DEWAR

(Exhibit 6, document Bates stamped Dewar 114 through 126 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 6 for identification. Do you recognize this to be the draft set of stipulations that are referred to in your report?

A. Yes, I do.

Q. Is it your practice to refer to things in draft form in order to render opinions?

MR. LARSON: Objection to the form.

A. I don't have some standard answer to that. I mean I don't have a practice one way or the other.

Q. Looking at what has been marked as Exhibit 6, the draft, were there any particular stipulations or draft stipulations in this document that you relied upon in order to formulate an opinion in this case?

A. No.

Q. Were there any stipulations in the final which has been marked as Exhibit 5 for identification that you relied upon to formulate

DEWAR

an opinion in this case?

A. No.

MR. SCHAETZEL: Let me get this marked as the next exhibit please.

(Exhibit 7, document Bates stamped Dewar 129 through 136 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 7 for identification. For the record, it was produced at Bates numbers Dewar 00129 through 136, and I notice that on page 136, there is no signature. So my question is, does this represent a draft report to you?

A. I believe so.

Q. Could you please describe the process that you went through in order to prepare the report?

A. I read the materials for the case and then I prepared essentially a set of rough notes, text for the report, I thought the initial input to the editing process. And then we met to do the final editing.

I'm not very competent in Microsoft Word, so I relied on Mr. Larson's Word

DEWAR

expertise to format the thing into a reasonable form.

We went through -- he proofread, it was all done in a bit of a hurry, as you know from the time scale. So he went through, proofread, and we discussed some changes that in form, not really any changes in substance, just changes in form. And I believe -- I mean, I'm not very good at doing DIFs by a -- but these are very close, I believe, and probably this is just before the very final editing comments I made. I think it may be one or two extremely minor edits that were made to get from 7 to 1. That would be my memory.

Q. By 7 to 1, you mean what has been marked as Exhibit 7?

A. Exhibit 7 to Exhibit 1.

Most likely, this is the -- this is what we -- that we ended up with from our editing session and agreed was the final form, but then I read it once more very carefully and I found a couple of very minor style issues. Maybe only one. I only remember one.

DEWAR

Q. Let's then look at Exhibit 1 if we could then, the report that is signed. And the first page.

The second sentence reads, "I have been asked to analyze and offer my opinion on certain technical aspects of the operation of the eRes (electronic reserve) and uLearn systems at Georgia State University (GSU)."

If you carry into the next sentence, it talks about the technical aspect here including whether, "In the process of distributing course materials through these computerized systems, additional copies of the course materials are made and to describe how and where these copies are made."

A. May I make a correction there?

Q. Of course.

A. There is no "including" and this was the -- this was the complete scope of what I was asked to do.

Q. OK, thank you.

So in terms of that scope, you referred to in the process of distributing course materials and I'm interested in why you

DEWAR

used the word "distributing" there.

A. Normal use of electronic distribution is -- that's very familiar use of the phrase, of the term for any situation in which you distribute materials electronically.

Q. So when the professor at NYU put the PDF copy on his web page, you would have considered that to be an electronic distribution of the book?

MR. LARSON: Objection to the form.

A. It's part of the distribution activity.

Q. Which part?

A. Well, actual distribution occurs when people access that and get copies.

Q. OK. And that would apply as well to, for example, the Georgia State eReserves, right? They would, in your mind, be a distribution when the student accesses an item that's on the eReserve system, is that correct?

A. Yes.

Q. Do you consider the posting of the material to the website, whether it is the professor's website or eReserve or some other

DEWAR

website, do you consider the posting of it to be the distribution or merely a part of some distribution?

MR. LARSON: Just to be clear, we are talking about distribution as the Professor is using the term and not in a legal sense.

A. It is an informal use of the term. It is making it available for distribution.

Q. OK. Reading on in that last sentence, it talks about the process of distributing course materials through these computerized systems. For these computerized systems, I presume, refer back to the Georgia State eReserve and uLearn systems, is that correct?

A. Correct.

Q. Have, other than what you have identified already as, you know, reading the depositions and so on, and the websites, I don't mean to exclude anything, have you done anything else to familiarize yourself with the operation of those systems?

A. No.

MR. LARSON: Can I just hear his question and the answer.

DEWAR

(Record read)

Q. In the next paragraph, which is top of page 2 of the report proper, near the bottom of the paragraph, you make reference to course packs. Do you see that -- I am sorry, near the bottom of the first paragraph.

A. Yes, yes, I see it.

Q. This activity is from a technical standpoint?

A. I see it.

Q. And I can tell you over on page 7, you are welcome to look at it, in the third paragraph of the conclusion, you use similar language but in particular, you say, I've had plenty of experience with course packs, in effect. Do you see the first sentence of that?

A. Yes.

Q. What is your experience with course packs?

A. I've used them in many of my courses.

Q. What did you do to have a course pack prepared in your courses?

A. I would take the material over to the copy shop and I would ask them to make X number

DEWAR

of copies for X-Y-Z cost.

Q. And did you do this while you were at IIT?

A. No.

Q. So this would have been at NYU?

A. NYU, yes.

Q. Did there -- when you say you would take them over to the copy shop, was that an NYU copy shop?

A. No, commercial copy shop.

Q. So a commercial copy shop?

A. NYU was more expensive.

Q. I can believe it. So you say you would take the materials. What types of materials would you take?

A. Stuff I had authored.

Q. Was any of that material that had been published?

A. None of that material had been published.

Q. Did you ever take any published material over to a copy shop to be --

A. No.

Q. I am sorry, let me finish the

DEWAR

question. I understand your answer, I just want to get it out.

Did you ever take any material that had been published to the copy shop in order for it to be placed into a course pack?

A. No.

Q. Once the copy shop would make up the course pack, what happened next?

A. I would --

MR. LARSON: I will object to the form.

You can answer.

A. I would tell the students they could get the reading material for the course from such and such a copy shop and they would go over and buy copies.

Q. Were you aware of whether other professors provided course packs in their teaching at NYU?

A. Yes.

Q. Did you ever see any of the other professors' course packs?

A. Yes.

Q. Do you know if any other professors

DEWAR

would have used materials for anyone authored by somebody other than the professor in the course packs that they had prepared?

MR. LARSON: I object to the relevance of the answer.

You can answer.

A. Yes.

Q. So yes, they would use materials authored by others?

A. Yes.

Q. Did you ever provide, for lack of a better term, any friendly advice regarding that practice to such other professors?

MR. LARSON: Object to the form and relevance.

You can answer.

Q. Do you have any knowledge as to whether NYU ever said anything to any of these other professors about course packs?

MR. LARSON: Object to the form.

You can answer.

A. There were -- there were policy advisories on the forms that needed filling out and so on.

DEWAR

Q. Do you know if those policy advisory or those forms included a consideration of -- consideration of whether or not the copies being made constituted a fair use?

A. No, I have no recollection fair use was ever an issue.

Q. Going back to page 2 of your report. The first sentence at the top of the page, "Dr. Crews takes the position that the provision of course materials through eRes is essentially the equivalent of putting those materials on hard copy reserve in the library." And then you footnote.

The footnote at the bottom of the page reads, "See expert report of Kenneth E. Crews at 8," with a quote from that portion.

My question is, do you recall if there were any other portions of Dr. Crews' report that you felt took the position that the provision of course materials through eRes is essentially the equivalent of putting those materials on hard copy reserve in the library?

MR. LARSON: You are asking does he

DEWAR

recall if there were any?

MR. SCHAETZEL: That's my question.

A. I don't recall.

Q. And in preparing this, did you attempt to cite to places where you thought Dr. Crews had taken that position?

A. Well, I just -- I picked this one cite which seemed clear and decisive to me.

Q. In the next sentence, you state "However, unlike traditional hard copy reserves, where a single copy of a work is placed in a reserve area in the library, the provision of course materials through eRes or uLearn entails the distribution of a copy of the reading material to each and every student in the class who accesses the material online."

Do you see that sentence?

A. Yes.

Q. Does it matter to you -- I would like to focus your attention on the words "course materials" there.

A. Yes.

Q. I am wondering, in terms of your opinion, does it matter to you whether or not

DEWAR

the course materials are required readings or readings that might be recommended but not required?

A. For this sentence, it is irrelevant.

Q. And it is irrelevant, as well, for your opinion in the case, is it not?

A. It is irrelevant for my opinion in the case.

Q. Is it your opinion that Dr. Crews would somehow contend that, let's say, for example, downloading a PDF off the internet is not the making of a copy?

A. That's speculative a bit, but let's say it this way. It isn't clear from his report that he clearly states that it is a copy. I didn't find that statement anywhere in his report. I can't really speculate on anything that wasn't in the report.

Q. Is it, therefore, also your view that, for example, Dr. Crews does not clearly state that if a person were to download or, you know -- yeah, I guess download a PDF to a DVD or to some other drive, there was nothing clearly stated in his report that said that was making a

DEWAR

copy?

MR. LARSON: Object to the form of the question. His report says what it says.

A. I don't recall any clear statement but -- to that effect.

Q. And it is your opinion in both cases, whether it is downloaded from the internet or downloaded from some other media, by downloading a PDF, the person has made a copy, isn't that correct?

A. I am sorry, I don't understand what you mean by downloading from some other media.

Q. OK. Let's start with just taking something off the internet. If I download a PDF from the internet, is it your opinion that I have made a copy?

A. What are you doing with it; looking at it, printing it? What are you doing it?

Q. Downloading it on to my machine right now?

MR. LARSON: Object to the form.

You can answer.

A. That's vague technically because downloading is -- downloading just involves getting the bits off the internet wire. So the question is what happens to those bits.

Q. I've not opened it yet. I have right-clicked if you will, clicked "copy," and I have put it on to my hard drive of my computer.

A. Certainly a copy has been made.

Q. So it doesn't matter, for that analysis, whether or not I have actually read the document, does it?

A. No.

Q. And if I receive an attachment in PDF form, an e-mail attachment from Mr. Larson in PDF format and I transfer that PDF to my hard drive, it is your opinion that I have made a copy, is that correct?

A. Yes.

Q. Is it your understanding that in either of those instances, whether I have transferred from the internet or I have transferred from an e-mail attachment, that Dr. Crews takes issue with whether or not a copy has been made?

MR. LARSON: Objection to form.

You can answer.

DEWAR

A. That's why I was technically confused. E-mail is sent over the internet. So I don't understand the distinction you're drawing.

Q. OK, I want to know, I'm trying to understand where you believe points of contention are with Dr. Crews in terms of whether or not transferring a PDF, whether it be to my hard drive or to a thumb drive or anything else, I just want to understand where you believe the points of contention are as to whether or not a copy has been made. And for example, I'm just looking at page 6 of your report first paragraph, a PDF is sent as an attachment to an e-mail message. The recipient clicks on the attachment and has a choice of opening and viewing the file or storing the PDF file in a designated location; for example, a local folder. Is it your opinion that if the person opens the file and views it, a copy has been made?

MR. LARSON: Object to the form.

You can answer.

A. Yes.

Q. Is it your understanding that

DEWAR

Dr. Crews has a different view of that?

A. I was really asked to look at the question of whether there was copies. I wasn't asked to look at Dr. Crews' report from the point of view of guessing what he might or might not think a copy is. So I really can't answer those questions.

Q. Going back to the first paragraph on this page, if the PDF is not viewed but rather instead is simply transferred to a local hard drive, it is your opinion that a copy is made there as well, isn't that correct?

A. That's correct.

Q. The next paragraph on this page speaks to the second form in which PDF files are transmitted over the internet and this is using browser, correct?

A. Yes.

Q. And in this instance, the example you give beginning in the third paragraph is when a GSU student would, for example, access material that may be placed on to uLearn or electronic service, is that correct?

A. Correct.

DEWAR

Q. It is your opinion when the GSU student opens that PDF for viewing on their computer, then a copy has been made, is that correct?

A. Yes.

Q. What about when the GSU student simply receives the PDF?

MR. LARSON: Objection.

Q. Hasn't opened it, hasn't viewed it, hasn't transferred it, hasn't stored it?

MR. LARSON: Objection, objection to the form.

You can answer it.

A. What do you mean by "receive"?

Q. OK. In other words, the -- the GSU student clicks in the eReserve, isn't that correct?

A. Yeah.

Q. There is an item there that they want to review, a PDF.

A. Yes.

Q. That person can see that the PDF is on eReserve, but they haven't done anything to, if you will, transfer it to their machine. Is it

DEWAR

your opinion that there has -- they are aware the PDF is there because they can see the link for it. Is it your opinion that at that point in time, there is a copy what has been made by the student of what's in that PDF?

A. No.

Q. Any of the work that you have done in this case, could you determine how many students at Georgia State University in a given class had accessed a given item on the eReserve system?

A. No.

Q. In any of the work that you have done in this case, could you determine how many students had accessed a given item in the uLearn system?

A. No.

Q. Did you ever take a look at any information that would provide, for example, hit counts or anything of that --

MR. LARSON: Object to the form.

You can answer.

A. I think there may have been some data of that kind in some of the materials I reviewed. But I didn't -- it was not germane to

DEWAR

my opinion.

Q. And what does the term "hit counts" mean to you?

A. It is a vague term. It is used generally to reflect the number of people who have done something or other on the web.

Q. Have you done anything in this case to determine, let's say for example that hypothetical here, the Larson on copyright law article has received 100 hits. Have you done anything in this case to determine whether or not that represents 100 different students or ten students accessing Mr. Larson's article ten different times?

MR. LARSON: Object to the form.

You can answer if you are able.

A. No.

Q. Looking again at page 2 of your report. The last sentence now on the first paragraph, the activity is -- and by activity, I believe -- take your time to put this in context and you're welcome to take as much time as you need -- but I think we are talking now about the provision of course materials through eRes or

DEWAR

uLearn that's in the previous sentence. "This activity is from a technical standpoint, therefore, more akin to the use of course packs distributed to students than traditional hard copy reserves." Do you see that opinion?

A. Yes.

Q. Can you identify any differences between the provision of course materials through eRes or uLearn and hard copy course packs?

A. There are myriad differences. One is always on paper. The other might not be on paper. I guess that's the primary difference.

Q. If I am the student using eRes, do I pay for that in the same fashion that I would have paid for the course pack that I picked up --

MR. LARSON: Objection to the form. Are you talking about at Georgia State?

Q. We will make me a student at NYU. I unfortunately never got that opportunity, but if I were, if I got something off of an eRes system or, for example, off of a professor's website

DEWAR

rather than eRes because I understand NYU doesn't have that, if I got something off of a professor's website, I don't have to pay for it in the same fashion that I would have to pay for a course pack at NYU, would I?

MR. LARSON: Object to lack of foundation.

A. You might. That's a decision on whoever sets up the system, whether there is a charge.

Q. Did you ever have a charge for materials that you put on your websites at NYU?

A. No.

Q. Are you aware of any other professors that that had a charge that the student had to pay to get material off their websites?

A. No.

Q. You mentioned the paper difference between the provision of materials through an eRes or uLearn and a course pack. Can you think of any other differences?

A. No, not really.

Q. In order to get materials off of uLearn or eReserve, a student can do that

DEWAR

remotely, can they not?

A. Yes.

Q. If a student in your class was going to get the course pack, they would have to have gone to the copy shop, is that correct?

A. That's true, sir.

Q. Can you think of any other differences?

A. Well, obviously in the electronic case, they have more options of what they can do with the file. They can put it on their iPhone if they wanted and read it on their iPhone. Any time something in is in electronic form, you have a lot more freedom once received.

Q. Sure, sure.

A. They can search it, that's another example or index it. There are many tools for playing with PDFs which wouldn't apply to the paper versions.

Q. In the course packs that you had prepared for your courses, since you used material that you had published, would it be correct that you then did not seek permission from any publishers in order to have your course

DEWAR

packs prepared?

MR. LARSON: Objection, mischaracterizes the prior testimony.

A. I never sought permission from any publishers for my course pack material.

Q. And I think Mr. Larson's objection may well be to things that you have published. I guess they were things that you had authored?

A. The things that I had authored, yes, but not published.

Q. Did you have an occasion to do some research into course pack legal cases as a part of this case?

MR. LARSON: Objection to the form.

You can answer.

A. No.

Q. I'll just tell you and I'm glad to get it -- here I will just --

MR. LARSON: If you want to describe it, I think the Professor will know what you are talking about if it makes it quicker.

Q. I will try to describe it. There was something that I think had been downloaded from the University of California on course pack

DEWAR

cases that were in the materials that you provided. Does that refresh your recollection?

A. Yes, I got that.

MR. SCHAETZEL: Let's get this marked as the next exhibit, please.

(Exhibit 8, document Bates stamped Dewar 00127 through 128 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 8 for identification. What is this document?

A. This is a document from the California Institute of Technology.

Q. Did you download this on your own?

A. I looked at it, yes.

Q. Where did this copy come from?

A. I mentioned that I looked at -- I assume you printed it off.

MR. LARSON: I will represent that based on the Professor's representation, this was something that he had taken a look at some point in preparing his report. We made a copy and provided it.

Q. Do you know if Cal Tech has an

DEWAR

objection to Mr. Larson copying things did -- withdraw the question.

A. No.

Q. For what purpose did you look at this?

A. I know of the Kinko's NYU case, everyone at NYU is very aware of that, and I actually looked to see whether there was some convenient summary of that case to refresh my memory of it with regard to course pack rules.

Q. I don't believe that case is mentioned in at least these two pages?

A. No, because it wasn't particularly relevant. I was mentioning everything I looked at. But when I looked at this, it wasn't particularly relevant to anything I had.

Q. Did you have any involvement in the Kinko's NYU case?

A. No.

Q. What is your understanding of that case?

A. My understanding is that a lot of course pack material was being prepared without any regard to or let's say sufficient regard to copyright considerations and there was a consent decree signed in which the university agreed that in the future, they would be more careful and make sure their faculty members were more careful and the copy shops would be more careful. The copy shops actually are the people who enforce this policy.

After the consent decree you can't walk along with stuff and say copy this. The copy shops operate completely different after the consent decree. That's why everyone was aware of it.

Q. What role, what explicit role, if any, did that understanding play in the work that you did in this case?

A. Not really any.

Q. If you look on page 3, proper review of report?

A. May I ask for a short bathroom break.

Q. Sure.

(Recess)

Q. Professor Dewar, what do you consider to be your area of expertise or areas?

A. Really all aspects of computer software. I am very familiar with compilers,

DEWAR

programming languages, operating systems, networking systems. So really all aspects of computer software and also I am, I have a significant expertise in software copyright issues, really focused on software there.

Q. What are the software copyright issues that you consider yourself to have an expertise in?

A. Well, what constitutes infringement and what doesn't in the software area.

Q. Do you understand this case, the publishers and the GSU case here, to have software copyright issues?

A. No.

Q. Do you consider yourself to have an expertise in copyright law?

A. No, not in general, no.

Q. What about in library science?

A. No.

Q. What about the publishing industry?

A. No.

Q. If you please now turn to page 3 of your report.

A. Under row III, the third line starting

DEWAR

there, it reads, "The system allows instructors or personnel of the library to scan in course reading material, usually excerpts of books and journals, make those excerpts available to students in portable document format (PDF) and then disseminate these documents to students registered in the course for which the documents are placed on the reserve system. Students view the material through their internet web browsers by visiting the eRes page on the GSU website."

I am interested in that part of that sentence, if we just stop at that point. Is it your opinion that when the students view the material through their internet web browser that a copy has been made at that point?

A. If they view the material? Yes.

Q. Then in your view, a --

A. A copy has been made, yes. I should say actually multiple copies.

Q. Understood. You described how there would be one made at the sending and one made at the receiving end?

A. Yes, yes.

DEWAR

Q. I got it. The next part of the sentence, reading, "Searching for the pages where materials for the particular courses are made available and clicking on hyper links to the reading materials," just trying to understand the sentence because it seemed a little confusing to me. If we sort it out, students view the material through their internet web browsers but at the end of the sentence we are clicking on the hyper links to the reading materials. Are you drawing a distinction between those two things?

A. Students view the material through their internet web browsers by, and then I describe the process.

Q. OK. Has a copy been made -- let's go through the three steps then of the process. First step of the process would be visiting the eRes page on the GSU website in this sentence, is that correct?

A. Right.

Q. Has a copy been made by the student when they visit the eRes page at the GSU website?

DEWAR

A. No.

Q. Searching for the pages where materials for their particular courses are made available, has a copy been made at that stage?

A. No.

MR. LARSON: I object to the form.

You can answer it.

Q. And clicking on hyper links to the reading materials, has a copy been made at that stage?

A. Yes.

Q. The next sentence, reading, "When they click these links, they are able to view the reading material in PDF format on their computer screens, and if they choose, save the material to their computers and print out copies."

Is it your opinion that when the student saves the material to his or her computer, that that's making another copy?

A. Yes.

Q. I want to use the word or term "another copy" carefully there. It is your opinion, is it not, that the first copy is when it is on the screen?

DEWAR

A. Yes.

Q. And then a second copy is when they save it, correct?

A. Yes.

Q. And if they, looking at the last part of this sentence, then print out a copy, that would be a third copy, right?

A. That would be a third copy, yes.

Q. All right. Looking over at the next paragraph, take your time to read through that, I am interested in the last line.

A. Yes.

Q. Have you had a chance to review it?

A. Yes, I reviewed it.

Q. The last line states, "I understand that large amounts of materials are placed on the two systems and that a single course can have dozens of excerpts from separate books." Do you see that?

A. Yes.

Q. What is that statement based upon?

A. Material from the depositions and in progression of how the whole system works, from multiple statements in the depositions.

DEWAR

Q. You didn't cite to anything there?
A. I didn't cite, no.
Q. Do you recall anything from the deposition where a person said there was a large amount of material placed on the system?
A. Not specifically that I recall that.
Q. What do you consider a large amount?
A. Hard to say. When I looked at it, it is really more of an overall impression that this is -- this system is used in many courses and there is a lot of material that is out there and I don't know that I have any quantitative understanding of "large amount." It is not really relevant to my opinion in any case.
Q. OK. Is it possible that one of the lawyers might have said to you in their view, there was a large amount of material and that's the basis for the statement?
A. No, it is an impression I got from the material that I read. And from -- the complaint also has that implication certainly.
Q. It's true, is it not, that you have done nothing to determine any sort of quantity as to the material that has been placed on

DEWAR

either system?

A. No, I wasn't asked to and it is really not relevant to my opinion.

Q. And you have also done no analysis to determine whether the material that is placed on either of those systems would be a fair use in keeping with the copyright statute?

A. No, I haven't done any analysis of that kind.

Q. If you would, sir, turn to page 7 of your report, your conclusions.

A. Yes.

Q. Looking at the first paragraph, as I noted in the introduction, "Dr. Crews takes the position that the provision of course materials through eRes is essentially the equivalent of putting those materials on hard copy reserve in the library.

"In a traditional paper reserve system, a professor teaching a class can ask the library to put certain books or journal articles on reserve. Students can then go to the library and either sit in the library reading the material or check it out for

DEWAR

limited periods of time, but the library does not make and distribute copies to each of the students."

That's the paragraph I am interested in.

A. Right.

Q. You did not mention the ability or perhaps even the practice of students taking reserve copies of a book or portion of a book or a journal article and copying that at a xerox machine and then using that copy as their source material for reading the material?

A. Right, I have never been --

MR. LARSON: Wait, objection, is there a question that you are asking?

Q. Yes, and I'll get it out as soon as you all let me.

A. All right.

Q. Am I to understand that you don't -- you are not aware of such a practice?

A. I have never been aware of any of my students doing that.

Q. You were aware of at least at NYU that there was the sign above the xerox machine that

DEWAR

said you needed to comply with the copyright law, correct?

A. Right.

Q. Do you have any understanding as to why the library or the school would have caused school or library would have caused that sign to be placed by the copy machine?

A. These are copy machines used by faculty, so the message was to faculty you can't go duplicating large chunks of books and handing out the results to your students because in addition to the course pack material, we had access to Xerox machines for the faculty and I often would duplicate stuff like exams for my students. So the notice was more as a warning to remind you you can't use that mechanism freely for copying copyrighted materials.

Q. To your knowledge, were there not similar signs posted at copy machines that might have been available to students in the library?

A. I don't know anything about what copying machines were in the library. I never heard of students using them or never saw any of my students -- copying a whole book would be a

DEWAR

huge enterprise. I'm never aware of any of my students doing that.

Q. You are not, for example, aware of students fishing for nickels to try to make copies of --

A. No.

Q. Interesting. If I can get this marked as the next exhibit please.

(Exhibit 9, document Bates stamped Dewar 50068 through 69 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 9 for identification. For the record, it was produced at Bates number Dewar 0068 and 69. Do you recognize this to be a letter from the Weil Gotshal firm to you dated October 12?

A. Yes. I am sorry, yes, I recognize this exhibit.

Q. It is signed by a Randy Singer. I wonder if that refreshes your recollection as to the other lawyer that you had met with.

A. Who did I meet?

MR. LARSON: I am happy to represent

DEWAR

that Randy Singer was present in a meeting.

A. It was Randy Singer, all right, fine. I just didn't recall the name. So yes, I have met him.

Q. Have you had any other contact with the Weil Gotshal law firm?

A. No.

Q. Does Ada Core, for example, have legal counsel?

A. No, we don't. Haven't needed it so far.

MR. LARSON: I should also note for the record this version is unsigned. At the time the production was made, the signed version was in the mail. I am happy to provide a copy of the signed version. I just wanted to --

A. Yeah, I did sign this document.

(Exhibit 10, document Bates stamped Dewar 00086 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 10 for identification.

A. Right.

DEWAR

Q. Produced at Bates number Dewar 0086.

A. Right.

Q. What is this document?

A. This is the document that I sent in response to my final reading of the final version of the report which we had done the final editing on together.

Q. You mentioned earlier today about there being some -- I believe you used the term minor last minute edits?

A. This is it.

Q. Is this a reference to that?

A. Yes.

Q. Other than reviewing the materials that are in Exhibit B to your report, did you find it necessary to do any research for the preparation of this expert report?

A. No.

(Exhibit 11, document Bates stamped Dewar 00179 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 11 for identification.

A. Yes.

DEWAR

Q. What is this document?

A. An e-mail message from me to Mr. Larson.

(Exhibit 12, document Bates stamped Dewar 00140 through 178 marked for identification, as of this date.)

Q. You have been handed what has been marked as Exhibit 12 for identification which is the rebuttal expert report of Professor Crews. Does the e-mail message at Exhibit 11 reference this rebuttal report that is at Exhibit 12?

A. Yes, it does.

Q. Other than what you have set forth in the e-mail message, do you have any other opinions or reactions to Professor Crews' rebuttal expert report?

A. No. I mean, you know, in my e-mail, it is the seriously section that is significant and I read through the report to see whether there was something that read on my opinion, specifically on the copying issue, and basically my conclusion was that there wasn't. So really -- there was really nothing here that was relevant to my narrow mission.

DEWAR

Q. Other than the -- I am sorry, is there a question?

MR. LARSON: Was this supposed -- I am looking, I just got handed a wrong copy.

MR. SCHAETZEL: You have the wrong copy?

MR. LARSON: What I marked as 12 was Professor Dewar's report but --

A. It is the rebuttal report.

MR. SCHAETZEL: It is OK. I presume that you have enough copies of it.

MR. LARSON: It actually may be here.

MR. SCHAETZEL: I may have grabbed too many pages. It is the last thing. Thanks. Sorry. If you don't want it, you are welcome to leave it here.

A. One of these days, all of this will be electronic.

Q. You mentioned that you went back and looked at the California, Cal Tech --

A. Yes.

Q. Page on course pack cases, for lack of a better term?

A. Yeah.

DEWAR

Q. Did you do any other research into let's say copyright law for the purposes of preparing your report?

A. No.

MR. SCHAETZEL: And with that asked and answered, we have no further questions at this time.

Professor Dewar, thank you very much.

MR. LARSON: If we could take a moment to see if we want to follow up.

MR. SCHAETZEL: Of course, of course.

(Pause)

MR. LARSON: Just a couple of follow up questions.

EXAMINATION BY
MR. LARSON:

Q. Professor Dewar, you testified earlier in the deposition that there were "myriad differences" between eReserves and in hard copy course packs. Do you recall that?

A. Yes.

Q. Does that observation impact your conclusion in any way that eReserves is more akin to course packs than it is to traditional

DEWAR

library reserves?

A. No.

Q. One other question, did you visit the Georgia State eReserves site on the GSU website?

A. Yes, I did.

Q. What did you observe there?

A. I observed the general layout of the site, how you navigate through the site, how you get to the point of clicking on documents, but I couldn't actually click on them, because they are password protected at that point.

Q. Did that visit to the GSU eReserve site inform your opinions in the report?

A. Yes, it confirmed my impression of how the site worked that I had drawn before -- from the other material, I went there and it confirmed my understanding of the organization of that site.

MR. LARSON: Thank you, no more questions.

MR. SCHAETZEL: We have no questions.

MR. LARSON: OK. I would like to reserve the right to review the transcript and have Professor Dewar complete an errata

DEWAR

sheet if necessary.

____

ROBERT B.K. DEWAR

Subscribed and sworn to
before me this day
of , 20 .

____

DEWAR

INDEX:

WITNESS	EXAM BY:	PAGE:
R. Dewar	Mr. Schaetzel	6
	Mr. Larson	92

EXHIBITS

Exhibit No.		Marked
Exhibit 1	Expert Report of Robert B.K. Dewar	5
Exhibit 2	document Bates stamped Dewar 00071	42
Exhibit 3	document Bates stamped Dewar 0001 through 0002	47
Exhibit 4	document Bates stamped Dewar 138	49
Exhibit 5	document Bates stamped Dewar 00096 through 108	50
Exhibit 6	document Bates stamped Dewar 114 through 126	51
Exhibit 7	document Bates stamped Dewar 129 through 136	52
Exhibit 8	document Bates stamped Dewar 00127 through 128	75

DEWAR

EXHIBITS

Exhibit No.		Marked
Exhibit 9	document Bates stamped Dewar 50068 through 69	87
Exhibit 10	document Bates stamped Dewar 00086	88
Exhibit 11	document Bates stamped Dewar 00179	89
Exhibit 12	document Bates stamped Dewar 00140 through 178	90

CERTIFICATE

STATE OF NEW YORK)
)ss:
COUNTY OF NEW YORK)

I, MARY F. BOWMAN, a Registered Professional Reporter, Certified Realtime Reporter, and Notary Public within and for the State of New York, do hereby certify:

That Robert B.K. Dewar, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 18th day of December, 2009.

____

MARY F. BOWMAN, RPR, CRR

* * *ERRATA SHEET* * *

NAME OF CASE: Cambridge v. Becker

DATE OF DEPOSITION: 12/8/09

NAME OF WITNESS: ROBERT B.K. DEWAR

Reason codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

Page ____ Line ____ Reason____
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Page ____ Line ____ Reason____
From ___________________ to_________________

Page ____ Line ____ Reason____
From ___________________ to_________________

Page ____ Line ____ Reason____
From ___________________ to_________________

Page ____ Line ____ Reason____
From ___________________ to_________________

Page ____ Line ____ Reason____
From ___________________ to_________________

Page ____ Line ____ Reason____
From ___________________ to_________________

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